THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 1, 1998 Session

JOSEPH A. CASHIA, ET AL. v. BRUCE A. HANCOCK, ET AL.

Appeal from the Chancery Court for Williamson County
No. 23606 Henry D. Bell, Chancellor

No. M1997-00252-COA-R3-CV - Filed July 9, 2002

These actions were consolidated for trial. Mr. Hancock filed suit to recover the balance owing on a contract to build a residence for Mr. and Mrs. Cashia, who counter-claimed and also filed a complaint against Mr. Hancock for damages for breach of contract, fraudulent inducement to contract, and violation of the Tennessee Consumer Protection Act. The trial judge dismissed Mr. Hancock's complaint, and found that he violated the Tennessee Consumer Protection Act, Tennessee Code Annotated § 47-18-104, and awarded damages in the amount of $100,000.00 and attorney fees. We reverse and render.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

BEN H. CANTRELL, P.J., M.S., WILLIAM C. KOCH, JR., J., AND WILLIAM B. CAIN, J.

Barbara Jones Perutelli, Nashville, Tennessee, for the appellant, Bruce A. Hancock d/b/a Hancock Construction Company.

Gail Payne Pigg, Nashville, Tennessee, for the appellees, Joseph A. and Suellyn Cashia.

OPINION
PER CURIAM

Bruce Hancock, hereafter "Hancock," filed a complaint on October 2, 1995 alleging that he is a licensed contractor who in June of 1994, agreed to build a house for the defendants, hereafter referred to jointly as "Cashia" or as Mr. and Ms. Cashia individually, for a fee of $51,000.00. He alleged that after the house was completed certain expenses remained unpaid, including a portion of his fee. To secure the payment of these obligations he filed a lien on July 24, 1995 which he shortly released upon the defendants promise to pay the obligations in full. He further alleged that the agreement by the defendants was fraudulent and was made to induce him to release his lien. He sought judgment for all amounts owing, plus interest and attorney fees.

On October 30, 1995, Cashia filed an answer and counterclaim. They admitted the execution of a contract, but denied that the house was completed. They alleged that the lien was filed before the house was completed for the purpose of coercing them to pay sums not owed. They asserted a counterclaim by referencing a complaint they filed on October 3, 1995 against Hancock and adopted it verbatim.

In the complaint filed October 3, 1995 (one day after Hancock filed his complaint) Cashia alleged that they negotiated with Hancock to build a house on a lot in which Hancock had an ownership interest; that they were on a budget which required strict adherence; that Hancock provided a cost-sheet of $490,052.75 which included the cost of construction and the cost of the lot; that they executed a contract prepared by Hancock; that as "construction progressed costs began to greatly exceed the amount represented by defendant"; that although the contract required completion within seven (7) months, it was not ready for occupancy for eleven (11) months, and even then was not completed in various particulars.

Cashia alleged that they were fraudulently induced to contract because Hancock deliberately misrepresented the cost of construction, or negligently did so. They alleged that Hancock breached the agreement to construct the house in a good and workmanlike manner, and that he engaged in unfair and deceptive acts in violation of Tennessee Code Annotated § 47-18-104 entitling the Cashias to treble damages, prejudgment interest, and attorney fees.

Hancock filed an answer, alleging that he provided a job estimate which was a good faith estimate if the plaintiffs had chosen to stay within estimated allowances. He admitted that the costs exceeded the estimated amount; he denied that the contract required completion within seven (7) months; he denied that the house was not completed; he admitted the existence of a "punch list," some items of which he did not complete or correct because Cashia refused to pay him after agreeing to do so. Hancock affirmatively pleaded that he released a valid lien upon the representation that he would be paid, and in consideration of continuing to work and the release of his lien a novation occurred.[1]

The cases were consolidated for trial. In a brief memorandum, the Chancellor ordered (1) Hancock to pay Ms. Gillum's judgment[2], (2) found that the pleaded doctrine of novation was not applicable, (3) found that Hancock violated the Tennessee Consumer Protection Act, but did not do so wilfully, (4) found the testimony of expert Lackey to be "substantially more credible than that of expert Barnett." (5) awarded Cashia a judgment for damages in the amount of $100,000.00 with ten

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[1] In light of our disposition of this litigation, we pretermit a discussion of the theory of novation.

[2] Gillum Interiors was engaged to advise and assist with interior design. Since the Chancellor ordered Hancock to pay her fee, he presumably found that she - admittedly an independent contractor - contracted with Hancock. This implied finding is squarely at odds with the testimony of Ms. Gillum. She testified that she contracted with Cashia, consulted with Cashia, expected to be paid by Cashia, and was fired by Cashia. The implied finding is also essentially at odds with the testimony of Cashia. The point, however, is not crucial.

percent interest from April 1, 1995, and (6) awarded Cashia their attorney fees and discretionary costs.

Hancock appeals and presents for review the issues of (1) whether the court erred in construing the contract, (2) whether the evidence preponderates against the finding that Hancock violated the Tennessee Consumer Protection Act and (3) whether the court erred in awarding damages.

Cashia presents for review the issues of whether Hancock breached the contract, whether he negligently or fraudulently induced the contract, and whether the damages awarded are adequate.

The Evidence

Bruce Hancock

Hancock is a licensed general contractor and began constructing houses in 1984. He had a lot under contract that Cashia wanted, who had, at that time, developed a plan for their proposed residence. Hancock proposed several estimates, one of which was dated June 8, 1994, for $475,122.95, but did not include the cost of the lot, $77,000.00. Cashia took this estimate to the lending bank, which required the cost of the lot to be included in the overall estimate. Some of the budgeted amounts were then reduced and the estimated cost of the residence and lot was around $490,000.00.

Hancock testified that Cashia was satisfied with the estimated cost of $490,000.00, which was further reduced by the elimination of a finished basement. He testified that "we had to stay within the budget categories" and Cashia agreed.

When asked if he "ever represented to Cashia that this was a guaranteed price," he replied, "No." Counsel for Cashia objected to the question and answer, and the objection was sustained.[3]

He testified that the Cashias needed a decorator and that he recommended Ms. Gillum to them. She was an independent contractor, according to Hancock, and was engaged by Cashia, was to be paid $5,100.00 by Cashia, was subject to the contract of Cashia, and was eventually discharged by Mr. Cashia.

He further testified that after construction began, computer generated reports were furnished to Mr. Cashia. The printouts showed the work codes. Mr. Cashia also wanted cash flow reports which were provided him.

[3] Counsel for Cashia asked *him* the same question on direct examination, without objection. Cashia replied that Hancock guaranteed the price.

Occasions arose when the costs exceeded the estimated amounts, such as concrete block, brick, and framing. The cost of the brick was attributable to the selection by Ms. Cashia, and the addition of a side porch - after the plans were prepared - plus the use of white sand and mortar, contributed to the costs in excess of the budgeted amount.

Mr. Cashia was not overly concerned about deviations from the budgeted amounts owing to his belief that in his new job [which he had held for about two months] he would receive a "big bonus," which did not materialize.

The tile went over budget because Cashia elected to use tile rather than carpet, according to Hancock.

Problems began to develop in April 1995 when the construction was ongoing. He testified that Ms. Cashia was distraught because it was income tax time and Mr. Cashia did not receive his expected bonus, and "that things were tense in the Cashia household." On one occasion Cashia did not authorize the bank to make a 'draw' to Hancock, who told him not to stop work on the house, and that he would be paid.

Hancock testified that "money kept getting tighter and tighter," that Cashia did not pay the ongoing bills, and that he filed a Notice of Completion together with a Notion of Lien to secure the amount then owing of about $19,000.00. Cashia wanted the lien removed because it inhibited his ability to secure personal financing, and assured Hancock that "you'll get paid." Whereupon, Hancock released the lien ten (10) days after filing it, and Cashia paid - authorized a draw - of $12,000.00 on July 24, but thereafter refused to pay the amount then owing. Total draws were $442,970.00, with $22,400.63 still owing which included Ms. Gillum's fee of $5,100.00, $1,000.00 for cabinets, plus $6,000.00 for carpet.

He testified that Cashia never raised concern about the quality of construction.

Joseph Cashia

Mr. Cashia is a registered nurse with a Master's Degree in accounting. He and Ms. Cashia had extensive conferences with Hancock before construction of the house commenced. He testified that Hancock said he "could build the type of home that we wanted . . . for $475,000.00," and that a contract was executed. Cashia took the contract to a bank to acquire financing, but his loan request was refused because "Hancock had not included the lot price on that."

He explained that he was paying $2,300.00 rent per month on a residence for himself, Ms. Cashia and three children, that they were 'fiscally minded', and had concluded that they could afford a mortgage payment of $2,800.00 monthly, which extrapolates into a loan of $475,000.00.

Cashia thereupon undertook to reduce the construction loan by $55,000.00, which he believed could be accomplished by deletion of a finished basement, plus other undescribed items.

When asked what he understood the word "estimate" to mean, he replied "His [Hancock's] cost of whatever it was going to cost or his guess of what it was going to cost for him to build the house."

Cashia testified that Hancock told him and Ms. Cashia that the cost of "my home" would be $490,052.75, which included the lot.[4]

Hancock introduced Diane Reed, a "design person" to Cashia. She prepared the plans and specifications.

Cashia was asked about his "understanding" of the contract, and replied that there was never any doubt in his mind that it was a "fixed price contract," and that he told Hancock that he would never agree on a cost-plus contract.

Construction began in August of 1994. The initial payment of $8,000.00 [referred to as a draw] to Hancock was made on August 6, 1994. The contract required Hancock to "make his best efforts to deliver the premises ready for occupancy by or before seven months of commencement of construction . . ." and Cashia said this time element was important for several reasons. He said the home was not finished in seven months, and remained unfinished at the time of trial in May 1997.

He testified that he received the monthly cash-flow summary from Hancock's bookkeeper, but that he wanted the invoices which Hancock refused to give him owing to the extra expense involved.

Because the "draws" had outpaced the construction, the lending bank declined to approve further advances on the construction loan. At this point and following a conference, Hancock advised him that, at the time, the accrued costs were $350,000.00, inclusive of the lot and interest on the loan. He testified that he later recognized that the cost of the lot and the accrued interest were not included.

Cashia went on to describe his frustrations with the construction, that Hancock then told him the contract was for a fixed fee of $51,000.00, and that the estimates were being exceeded. He said Hancock threatened to abandon the construction if he - Cashia - did not pay him, and the lending bank agreed in June 1995, to advance an additional $50,000.00, which entailed additional expenses for insurance and interest.

He testified that on July 26, 1995 Hancock "put a lien on my property" on the advice of his attorney, which greatly angered Cashia "who believed that Hancock was trying to extort money from me."

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[4]Hancock had contracted to purchase the lot for $77,000.00, but Cashia purchased the lot directly from the owner for $77,000.00

Cashia then critiqued the construction in considerable detail, the fireplaces were too small; some of the doors were uneven on the bottom; a wrought iron railing was wobbly; a bathtub was useless because entry steps were missing; a soap dispenser in the kitchen was not installed; the shelving in the media room was not sufficiently deep; some rooms leak; the bricks were not cleaned; certain painting was not professionally done. Cashia detailed a host of other defects in the house.

He testified that he had spent $540,570.00 on the house, lot, plans, and interest. Costs of repairs are not included, and that Hancock insists $20,360.85 remains owing to him.

On cross-examination Cashia denied that he owed Hancock any amount, but admitted that, in discovery, he testified that he owed Hancock the balance of $6,000.00 on his builders fee. He admitted that he employed Veda Carroll, a CPA, to "look at invoices." He testified that he listed the house for sale before moving into it, for $590,000.00, but had no prospective purchasers.

Suellyn Cashia

She testified that Hancock told them he could build the house for $490,000.00, and that a cost-plus contract was never discussed until May 1995 when he said "you had to know this is a cost-plus contract." She did not understand the meaning of a cost-plus contract until her husband explained it to her. She testified that the contract was never presented as an estimate, but rather as Hancock's "calculations for the cost of this home, that this is *what he thought the house was going to cost*." She and Ms. Gillum conferred with different vendors and "we would choose the things that I was supposed to have in the home." She critiqued various aspects of the house, including installations she believed to be of inferior quality.

Sara Gillum

Ms. Gillum is an interior designer. She testified that she was engaged by Cashia to "work on their home"; that Joe and Suellen Cashia controlled the work; that her fee was $5,100.00, computed at the rate of $1.00 per square foot; that Cashia had the right to terminate her; that she was terminated by Cashia, but her work was completed; that Cashia refused to pay her invoice; that her principal responsibility was to "specify the products that went into the home," such as plumbing, lighting, tile, carpet, paint colors, and the like; that to her knowledge Ms. Cashia was unaware of the specific allowances for purchases; that "when she chose things, cost was not an issue."

Neil M. Barnett

Mr. Barnett is an architect and contractor who was employed by Cashia to inspect the house and testify on their behalf. He described a host of defects, errors, omissions and other installations he disapproved of, ranging from grids in windows ($900.00) to a drywall ceiling in the garage ($4,000.00) to reworking a dormer ($4,500.00). When asked to "give us the cost of correction" he testified, $158,372.00, which included a fee of twenty percent to a supervisor. He also agreed that $26,000.00 should be deleted since Cashia had agreed that the basement would not be finished.

Mr. Barnett did not fare well on cross-examination. He admitted to limited experience - he had constructed only two houses - and that he had been involved in litigation challenging his competency and turpitude. Suffice to say that the Chancellor did not accredit him.

John Lackey

Mr. Lackey is a civil engineer, holding both a Bachelors and Masters degree. He was employed as a consulting engineer for fifteen (15) years, and for the last fifteen (15) years headed up his own residential construction firm. He has constructed more than sixty (60) residences in the half-million dollar range. On two occasions he inspected the Cashia house; when asked about its quality of construction, he replied "with the exception of the punch list items that at that time remained to be done, the quality of construction was excellent."

He found nothing that was structurally unsound, and found no construction defects other than the punch list items. He was unable to locate many of the defects alleged by Mr. Barnett, such as $6,500.00 to repair fascia, $8,500.00 to correct and repaint drywall, $10,000.00 for drainage, and $26,000.00 for supervisor.

Donna Howard

Donna Howard was the bookkeeper for Hancock Construction Company. She was responsible for all ledger entries, the accounts payable, the computer generated records, and the job-cost reports.

She testified that Cashia requested a cash flow report on a regular basis which she provided, and that she talked to Cashia once weekly; that she prepared reports which showed the estimated amounts. According to Ms. Howard, Cashia became frustrated with his wife and with Ms. Gillum, the decorator, because they had "gone overboard" on the items Ms. Cashia was selecting, particularly the tile. She met with a CPA *employed by Cashia*, and together they examined "hundreds and hundreds" of bank statements, cancelled checks, and invoices connected with the Cashia construction. The investigation by the CPA was thorough and nothing was found amiss.

Ms. Howard testified that the funds paid by Cashia to Hancock were never misapplied, and that as of September 6, 1995 there remained owing to Hancock the amount of $28,300.85 which included Ms. Gillum's fee of $5,100.00. The cost of the construction as of September 6, 1995 was $458,230.85.

Standard of Review

At the outset, we note that the trial court made no findings of fact as contemplated by Rule 52, Tenn. R. Civ. P. In response to a motion to do so, the Chancellor decreed that "findings and conclusions stated on the record are reaffirmed." The record reveals only one finding of fact, and one conclusion of law: That the contract which was the predicate of this litigation was a "lock and

key," i.e. for a specified price, and not a cost-plus contract plus some builder's fee. The finding of fact was directed to the issue of credibility of Mr. Barnett, the Cashia's expert. Consequently, our review is *de novo* on the record with no presumption of correctness. *Archer v. Archer*, 907 S.W.2d 412 (Tenn. Ct. App. 1995).

Analysis

Because we are constrained to disagree with the Chancellor concerning the nature of the contract executed by these parties, we find the following facts to be supported by a preponderance of the evidence.

Cashia contacted Hancock[5] in early 1994 about building them a residence. Hancock had an option on Lot 245 in Brentmede Subdivision which was apparently assigned to Cashia. Plans were proposed and the construction contract was executed. Hancock then began preparing estimates for the construction cost of the residence so that Cashia could obtain a loan. Two estimates were prepared for Cashia to present to Third National Bank to obtain financing: the first was for $475,122.95, which did not include the cost of the lot and included the completion of the basement, and was more than the bank would lend. A second estimate was prepared to reduce the amount of the construction loan budget by some $55,000.00. Hancock by letter to the bank on June 18, 1994 explained how the cost of construction could be reduced. He mentioned specific budget categories that could be altered to generate savings, including appliances, brick, cabinetry, lighting and plumbing fixtures, carpet, landscaping, millwork and decorating and interior design. The subsequent job cost estimate included the cost of the lot and was for an estimated amount of $490,052.75. The contract document contains no specific monetary figure except for the builder's fee of $51,000.00. It provides that home would be built according to the plans and specifications. Cashia acquired the lot in August of 1994 and construction soon began. Ms.. Cashia began making selections for various materials to be used in the home, with most of them being made in the fall of 1994. The Cashias admitted that they knew if they went over the allowances, they would be responsible for the overage and would receive credit if they were under the allowances. Ms.. Cashia told her husband that she took the documents with her showing what the allowances were when she made various selections. He continuously told her to stay within the budget because that was all they could afford, but she repeatedly made selections without determining the price, and represented to her husband that she was within budget and did not advise him that she was over budget until April of 1995 and at that point his approval was required of all expenditures. In May of 1995 Cashia, in a meeting with Mr. Hancock and his bookkeeper, told them that he thought his wife had gone a "little overboard." They went over the overages and discussed items in the house that could be removed to bring the cost down.

Financial difficulties developed in March or April of 1995. The failure of Mr. Cashia to receive an expected bonus contributed to the difficulties. The bank would not approve draw requests

[5] In 1993 Hancock contracted with Cashia to build them a residence, but during construction Mr. Cashia lost his job and encountered financial problems. Hancock offered to take over the project so that the house could be sold.

at that time because the draws had out paced the construction of the house. Because the draw requests were not being paid in a timely manner and although the contract provided that the builder shall not be required to finance or otherwise pay from his own funds for any portion of the construction and completion costs, there were occasions when Hancock made payments out of his own funds due to the delay in receiving the draws, that is, funds from the lending bank. By May of 1995, Hancock threatened to stop construction because of nonpayment. Mr. Cashia responded by advising Hancock, for the first time, that he considered the contract to be one for a fixed price and acknowledged that he was responsible for some of the overages but he felt that Hancock was also responsible for some of the cost overruns. Mr. Cashia then asked Hancock for his estimate of what it would take to complete the project, and thereafter obtained an additional loan to complete the construction. Upon the receipt of the requested draw, Hancock continued with the construction, and when the house was completed he filed a notice of completion and was thereupon advised by Cashia that he [Cashia] would pay all remaining costs. When the promised payment was not received, Hancock filed a lien on July 24, 1995. A week later Cashia prepared and presented Hancock with a new construction agreement and a punch list which provided that Hancock would be paid $8,277.14 in full settlement of all financial obligations and that the lien would be removed which would allow the owners to secure title to the property. The punch list made no reference to any items deleted or to deficient construction. Because the amount contained in the agreement did not reflect all sums due and owing to Hancock at the time, he did not execute the proposed agreement. Hancock testified that Cashia represented that he would be paid all sums due and owing to him, including moneys related to the sale of the prior home at Lot 73 if he would release the lien and complete the punch list items. Based upon Cashia's representation that he would pay him but in order to do so he had to be able to close and get clear title to obtain money from the bank, Hancock released the lien. He also started to work on some of the punch list items. When no payment was received after the lien was released, it became evident that Cashia did not intend to pay and Hancock stopped working on the punch list.

The Contract

It is a well established rule in Tennessee that the interpretation as well as the construction of a written contract is a question of law. *Davis v. Smith*, 28 Tenn. 557 (1848). The Cashias insist that the construction contract is one for a guaranteed cost, but it clearly does not so provide. The *cost* is not mentioned. The contract provides:

> Builder agrees to complete the premises in substantial compliance with the working drawings ("plans") attached hereto as Exhibit A and with the specifications attached hereto as Exhibit B and to furnish or cause to be furnished all labor, material, equipment, fixtures and appliances therefor. Builder will secure the subcontractors that are required to complete construction and he will oversee their work...

It is clearly a cost-plus builders fee contract. The specifications referenced in the contract, describe materials to be used and specifically provide monetary allowances for many items such as "exterior brick, allow $185 per thousand, plumbing, allow $5,400; lighting allowance $6,000;

cabinets, allow $19,200; appliances, allow $4,600; floor covering, hardwood, per plan, allow $8,688; carpet per plan, all $4,608; tile, per plan, allow $4,800." Some of the categories provide no allowances but merely describe the type of construction to be used. The only document which reveals the amount alleged by the Cashias to be fixed cost of building the home is a document prepared by Hancock which is entitled *Job Estimate.*

It is significant that the plans do not provide explicit detail regarding finish work. The plans for the media room, show built-in cabinetry along one wall, but the room was actually trimmed out in great detail and includes door, shelving and much trim. The plans for the dining room show a ceiling height only and no lighting, but the ceiling was finished in an oval recessed manner with trim and lighting. The plans for the side elevation of the home, show one large garage door with no steps leading from the side entrance to the ground. This area was nevertheless finished extensively with a balcony or landing and a flight of steps leading to the ground. Additionally, two garage doors were installed rather than the one which is shown in the plans.

The trial judge commented that the contract was "neither fish nor fowl" and construed the contract against the one who produced it in his determination that it was a "lock and key contract." As stated, we disagree. A contract must be construed with reference to the situation of the parties, the business to which the contract relates, and the subject matter as it appears from the words used. *Petty v. Sloan,* 277 S.W.2d 355 (Tenn. 1955); *New Life Corp. of Am. v. Thomas Nelson Inc.*, 932 S.W.2d 921 (Tenn. Ct. App. 1996). In the absence of fraud or mistake a contract must be interpreted and enforced as written even though it contains terms that may be thought harsh and unjust. *Ballard v. N.A. Life & Cas. Ins. Co.*, 667 S.W.2d 79 (Tenn. Ct. App. 1983); *NSA dba Benefit Plan v. Conn. Gen. Life,* 968 S.W.2d 791 (Tenn. Ct. App. 1997).

Both Mr. and Ms. Cashia testified that they understood that the cost of the house would be that contained in the estimate if they stayed within the budget amount. Mr. Cashia testified that he told his wife continuously to stay within the budget, because it was all they could afford. He was concerned that there were cost overruns and testified that the interior designer was telling him he was under budget while the computer printouts revealed he was over budget. When asked, "(d)id you ever advise your wife to look at the contract or the estimate to stay within those allowances," he replied that his wife and Ms. Gillum had it in their hands. It is apparent from the evidence that Ms. Cashia continued to select items which were in excess of the budgeted amounts, but reported to her husband that she was staying within budget. Mr. Cashia testified:

> Suellyn would go out with Ms. Gillum and pick out certain things. On numerous occasions, Suellyn would call me and say, 'we picked out lighting fixtures' for example, 'today and we are under our allowances.' Or she would call and say, 'we picked out our wallpaper' just etc., never really saying anything about overages, allowances or whatever.

Although the Cashias testified that Hancock represented the estimate was a fixed price, Ms.. Cashia testified as follows:

Q: . . .Tell the court what you understood the estimate to mean at the top of the sheet.

A: Well, it was never presented to us as an estimate. It was presented to us that these were Bruce's [Hancock's] calculations for the cost of this home. That this is what he thought the house was going to cost.

* * * * *

Q: Mrs. Cashia, you testified that you didn't have much in the way of construction experience?

A: Uh-huh.

Q: But you do have a masters degree from LSU, is that correct?

A: That's correct.

Q: Now, your position, as I understand it, is that even though the document that was attached to this contract that says estimate, you didn't understand that was an estimate?

A: My understanding - -

Q: Is that what your position is?

A: That's correct. I did not understand it to be an estimate.

Q: Alright. But you understanding was, though, that the plans and specifications represented a budget, and if you went over those allowances that the cost of the project would be more. Is that correct?

A: I understood that if I went over the allowances, I would have to pay for those overages.

Q: You never anticipated that this construction would be under the estimated amount, did you?

A: We never talked about that.

Q: And in fact, you never anticipated it would happen did you?

A: No.

Ms. Cashia understood that Sara Gillum's role was to assist her in making selections and stay within the allowances that had been given to her. She told Ms. Gillum, "Joe says I can choose anything I want as long as I stay within the allowance." But the proof is clear that Ms. Cashia continued to report to her husband that she was under budget when in fact she was over budget on may items. He became concerned and took the position that he was going to approve all expenditures. In May of 1995 a meeting was arranged wherein the overages were discussed. Ms. Howard, Mr. Hancock's bookkeeper, testified that they went over all the overages, Mr. Cashia became frustrated with his wife and with the interior decorator.

Significantly, Mr. Cashia testified as follows:

> Q: Now tell the court, please, what did you understand the word, estimate, there to mean. [reference is made to Exhibit 2].
>
> A: His [Hancock's] cost of whatever it was going to cost *or his guess of what it was going to cost for him to build the home.* (Emphasis added.)

There is no reason for Cashia to have been concerned with keeping prices within certain allowances if this construction were in fact one for a guaranteed cost. Ms. Cashia never contacted Hancock to inquire whether items were within budget. She made selections at supply houses when she was unable to determine the price. For example, she testified that price tags on lights were mounted where she could not see them. When she would inquire about the price, she was told, "don't worry about it, choose what you want" and that no one ever bothered to give her a price.

Cashia made several costly additions to the house, as for example, the elaborate ceiling in the dining room, and the addition of slate floors. A contract for a fixed price does not contemplate that the owners may add extensive detail to the construction. The amounts paid and progression of the cost would not be reported to the owner if this were a contract for a fixed amount, and discounts were passed on to Cashia. None of these actions is indicative of lock and key contract.

The contract provides for no specific dollar amount except for a builder's fee of $51,000.00. It is specifically provided in Paragraph 19:

> Integration. This agreement is totally integrated. *There are no other oral or written, prior or contemporaneous, understandings between the parties concerning the subject of this agreement.* (Emphasis added.)

The contract further provides in Paragraph 21:

> This agreement, upon acceptance by both parties, shall constitute the entire agreement between the parties hereto relating to said project and supersedes all prior to other agreements and representations in connection with said project and this agreement cannot be changed except in writing signed by the parties hereto.

The Cashias have taken the position that although the only monetary figure representing cost is contained in a document clearly entitled "Job Cost Estimate," Hancock verbally represented that the estimate was a guaranteed price.

Tennessee law has long held that the parol evidence rule, which is a rule of law, not one of evidence, disallows prior or contemporaneous parol evidence which contradicts the terms of a written agreement. In *Litterer v. Wright*, 268 S.W.624 (Tenn. 1924) the Tennessee Supreme Court held that parol proof of inducing representations to execution of a written contract must be limited to matters which are not otherwise plainly expressed. A lessee in *Litterer* attempted to prove by parol that as an inducement to enter into a lease agreement, the lessor made an oral representation that repairs would be made. The lease specifically provided otherwise. The Court held that the oral representations inducing the lessee were clearly inadmissible, and stated:

> Parol proof of inducing representations to the making of a contract reduced to writing must be limited to matters not otherwise plainly expressed in the writing. No well-considered case will be found holding otherwise. The fundamental distinction should be kept clearly in mind between the denied right to contradict the terms of the writing, and the recognized right without so doing to resist recovery thereon, or to rely upon matters unexpressed therein. The ultimate test is that of contradiction, which is never permissible.

Specific objection was made by the appellant to testimony violative of the rule but the appellees did not raise the issue in their brief. Suffice to say that the Supreme Court in the case of *Litterer*, supra**,** expounded the principle clearly:

> This is not merely a rule of evidence, but is a 'rule of substantive law.' *Wigmore on Evidence*, Sec. 2400. So, notwithstanding the failure of the motor company to object to the competency of the evidence of previous parol representations, and not withstanding the concurrent finding of the two courts on such evidence that prior representations were in fact made, the rights of the parties must be adjudicated according to the written contract, the terms of which repudiate any prior representations of quality or condition as items of an agreement between them. (*Deaver* at p. 434).

Moreover, the doctrine of merger prohibits prior parol evidence. *Marron v. Scarbrough*, 314 S.W.2d 165 (Tenn. Ct. App. 1958) held:

> Closely allied to the parol evidence rule, although not necessarily a part of same, but equally applicable to the facts of the instant case, is the rule that prior agreements, whether oral or written are merged into the written contract as finally executed . . . this rule of law, in our opinion, precludes the complainant in the instant case from relying on any alleged oral agreement made prior to the execution of the written contract . . .

Paragraphs 19 and 21 of the contract provides that all agreements are merged into the contract and that the contract reflects the entire agreement. The parole evidence rule aside, the evidence unmistakably establishes that the contract was cost-plus builders fee.

Mr. Cashia, at least by June of 1995, had sufficient information to determine whether a fraudulent misrepresentation, negligent misrepresentation, or deceptive act had been committed by Hancock. He could have, at that point, demanded arbitration pursuant to the terms of the contract. He did not do so. He could have, at that point, filed suit for a rescission of the contract, or suit for Hancock's misrepresentation or violation of Tennessee Consumer Protection Act. He did not do so. Rather, he made arrangements to pay for the remainder of the project when it was represented to him in writing that Hancock did not know the final cost of the project at that point. The Cashias did not raise a misrepresentation or consumer protection claim until October 3, 1995 when they filed suit, one day after Hancock filed suit against them for breach of contract. Courts have long held that the right to rescind a contract for fraud must exercise immediately upon its discovery, and any delay in doing so, and continued employment, use and occupancy of property received under a contract will be deemed an election to confirm it. *Russell v. Zanone*, 404 S.W.2d 539 (Tenn. Ct. App. 1966).

Even if the contract does not speak for itself, we find the record is replete with evidence that the Cashias, at least in May and June of 1995, knew that Hancock considered the contract to be a cost plus builder fee agreement, which they ratified by taking projected completion costs to the bank and obtaining a loan based upon those estimated costs. No issue was raised about misrepresentation.

It is of important significance that the last written communication from Cashia to Hancock is the purported agreement and punch list *prepared by Cashia* and sent to Hancock on August 1, 1995. This document provides, "the contractor has completed the residence according to the agreed upon specification." *There is no mention of any construction defects.*

The Tennessee Consumer Protection Act

Our review of the record reveals that there is no preponderant evidence to support a finding that Hancock violated Tennessee Code Annotated § 47-18-104 which prohibits unfair and deceptive acts in practices affecting the conduct of any trade or commerce. *See, New Life Corp. of Am. v. Thomas Nelson Inc.*, 932 S.W.2d 921 (Tenn. Ct. App. 1996); *NSA dba Benefit Plan v. Conn. Gen. Life*, 968 S.W.2d 791 (Tenn. Ct. App. 1997).

The appellees say that Hancock on cross-examination"admitted that many of these checks which had been represented as the Cashia job, and for which Cashia had been billed, totaling thousands and thousands of dollars, should have been applied to other jobs other than this one." This assertion is misleading in the extreme. Hancock had five other houses under construction at the same time. He explained that in order to determine what amounts were applied to various jobs, it was necessary to look to the transaction register or accounts payable register which shows every check written during a particular time. Hancock did not testify that the total amount of the checks were paid on the Cashia project; inspection of the checks reveal that they were for payment for other jobs as well. There were hundreds of checks drawn by Hancock, and produced by him on discovery and the trial. His bookkeeper, Ms. Howard, explained the procedures, especially the separation and payment of invoices and how the checks were applied to the various jobs. She testified that there were no funds received from Cashia that were not applied to work on material for the Cashia house. Moreover, Cashia employed *a CPA who audited the financial relationship with Hancock, and found only one error, a double payment to a subcontractor which was corrected.*

The allegation of fraud and misappropriation of funds by Hancock are perplexive in light of the accounting and bookkeeping procedures he employed, superimposed upon the undisputed fact Cashia employed an independent CPA to audit his financial relationship with Hancock *who reported nothing amiss.* Repeated references to testimony taken out of context are essentially pejorative.

Appellees stress that the fraud and misrepresentation began when "Hancock assured Cashia that Hancock would sell the lot to him at Hancock's cost." Such cost was $77,000.00, and Hancock later received a rebate from the owner of $7,500.00. Negligent misrepresentation consists of the following elements:

1. A representation to a past or existing material fact;
2. The representation must have been false;
3. The defendant made the representation without exercising reasonable care;
4. Made with the intent to induce the plaintiff to rely upon it;
5. Plaintiff must have been unaware of the falsity and acted in justifiable reliance upon the truth of the representation. The plaintiff must have sustained damage as a result of his reliance.

The elements of intentional misrepresentation are the same except that the defendant must have made the representation with an intent to defraud the plaintiff. *Tartera v. Palumbo*, 453 S.W.2d 780 (Tenn. 1970). We find no evidence that any of the elements have been proved. Appellees stress the matter of the rebate Hancock received from the owner of the lot on which the house was constructed.

Hancock had an option to purchase the lot from the developer of Brentmede Subdivision. When the Cashias entered into the construction contract with Mr. Hancock, he did not exercise his option, but rather the lot was *conveyed directly* from the developer, Houston Ezell Corporation to the Cashias for $77,000.00. Hancock then received a fee from the developer. The proof established that this is an incentive for builders to purchase and develop lots in developing subdivision. We

have held that a comparable practice is not a violation of the Tennessee Consumer Protection Act. In *Castelli v. Lien*, 910 S.W.2d 420 (Tenn. App. Ct. 1995), the trial court held that an interior designer's practice of marking up merchandise to a "retail price" to cover his fee was a deceptive practice under the Consumer Protection Act. We determined that under the facts of ***Castelli*** the Consumer Protection Act did not apply but held that even if the Consumer Protection Act had applied:

> We would still find that Mr. Castelli's conduct [of marking up products] did not amount to an unfair or deceptive act or practice. Retail merchants are entitled to make a profit and, except for the most extreme circumstances, are not required to divulge to their customers their profit margin, overhead, operating costs, or other similar information. The Liens did not allege or attempt to prove that Mr. Castelli made any misrepresentations concerning the price, characteristics, or quality of the goods he sold him. In the absence of such proof of misrepresentations or of some unethical, unscrupulous or oppressive conduct, Mr. Castelli's failure to disclose his cost or his markup was not a violation of the Tennessee Consumer Protection Act of 1997. (*Castelli* at p. 429).

Cashia paid the agreed upon and established price for the lot. There was no contractual obligation for Mr. Hancock to disclose or to pass on to Cashia the incentive rebate he received from the developer. The proof is satisfactory that only the actual cost of goods and services in the construction project were charged and that all discounts were passed on to Cashia.

The contract required Hancock to use his *best efforts to complete* the house within seven months after commencement of construction, subject to certain conditions. Eleven months were required. The appellees argue that the delay of four months damaged them financially - extra rent, for instance - for which they seek compensation. There is no evidence that Hancock failed to use his best efforts.

The appellees take Hancock to task because he filed a contractor's lien. He is accused of using the lien statutes to extort money from them; he is accused of misapplying Cashia's funds, of embarrassing and intimidating Cashia and coercing them in such manner as to shock the conscience of the court. He is accused of criminal conduct; of causing discord in the Cashia's relationship; of causing them emotional distress. We find no evidence in this record to justify these comments.

Damages

The Chancellor did not accredit Mr. Barnett, who testified for Cashia on the issue of damages. His testimony was essentially directed to the cost of repairs and corrections. The determination of credibility is peculiarly the province of the trier of fact, ***McReynolds v. Cherokee Ins. Co.***, 815 S.W.2d 208 (Tenn. Ct. App. 1991), and a study of the testimony of this witness

compels our concurrence with the Chancellor's finding that the testimony of Mr. Lackey "was substantially more credible than that of Mr. Barnett."

Thus it is that the issue of damages essentially turns upon the testimony of Mr. Lackey. We have heretofore referred to his testimony that he twice inspected the house and found no construction defects. "With the exception of the punch list items the quality of construction was excellent," according to Mr. Lackey.

It must be inferred from what the Chancellor did *not* find that he did not accord much weight to the testimony of Cashia respecting damages. Cashia employed an auditor, as we have seen, to examine his financial relationship with Hancock, and the auditor, a CPA, found nothing amiss. Hancock's bookkeeper testified at length that Cashia's funds were properly accounted for. And it is worth repeating that Cashia himself, towards the end of the construction, prepared and signed an instrument acknowledging that "the Contractor has completed the residence according to the agreed upon specification." It was not until Hancock filed his complaint to recover the balance owing that Cashia asserted their claims.

The award of damages and attorney fees were made pursuant to a finding that Hancock violated the Tennessee Consumer Protection Act. In light of our finding that there is no evidence that Hancock violated the Act, these awards cannot stand. If the judgment can be construed as alternatively resting on breach of contract, the awards cannot stand because they are not supported by a preponderance of the evidence. The testimony of Mr. lackey weighs heavily on this issue.

The judgment in favor of Cashia is reversed and their complaint is dismissed at their costs.

The judgment dismissing the complaint of Hancock is reversed, and judgment is here rendered in favor of Hancock and against Cashia for $22,460.63, which represents the balance of the funds owing to Hancock for the construction of the residence, and includes the fee of Sara Gillum of $5,100.00. As provided by Tennessee Code Annotated § 47-14-121 interest from July 24, 1995 is awarded. Costs are assessed against Cashia, and the case is remanded for the assessment of attorney fees as provided by the contract.

PER CURIAM